No. 47766-1-II

COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON

NARROWS REAL ESTATE, INC., dba RAINIER VISTA MOBILE HOME PARK,

Respondent,

v.

MHDRP, CONSUMER PROTECTION DIVISION, OFFICE OF THE ATTORNEY GENERAL,

Appellant.

OPENING BRIEF OF RESPONDENT/CROSS-APPELLANT NARROWS REAL ESTATE[1]

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[1] Per Division II General Order 2010-1.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Table of Cases

Washington Cases

Statutes

Other Authorities

A. INTRODUCTION

The Manufactured Housing Dispute Resolution Program ("MHDRP") is a sub-agency of the Attorney General's Office ("AG") empowered to address disputes between mobile and manufactured home park tenants and park owners. Its statutory authority to resolve these disputes is triggered by a tenant complaint. It does not have broad authority to act on behalf of non-complaining tenants as a class. In fact, when the MHDRP requested that its statutory authority be expanded to include such powers, the Legislature specifically rejected it.

Despite the MHDRP's circumscribed authority, it transformed "dispute resolution" regarding one tenant's complaint about water service charges into a *de facto* class action lawsuit by all of Rainier Vista's tenants. Then, MHDRP refused to investigate Rainier Vista's defense to the claim of overcharging, and simply ruled summarily that Rainier Vista owed its tenants more than $35,000 in overcharges.

Seeking relief from MHDRP's legally erroneous and arbitrary action, Rainier Vista sought a hearing before the Office of Hearing Examiner (OAH). However, in reviewing the matter, OAH also committed its own erroneous, *ultra vires*, and arbitrary actions, resulting in a different, harsher remedy imposed against Rainier Vista.

The MHDRP's action was flawed from the outset. Its Notice of Violation should never have issued, and OAH erred substantively and procedurally in not only affirming the Notice, but also imposing a harsher remedy on appeal. OAH's decision should be reversed, and the Notice of Violation dismissed.

B. ASSIGNMENTS OF ERROR

(1) Assignments of Error

1. OAH erred in granting partial summary judgment in favor of the MHDRP and denying Rainier Vista's Motion for summary judgment, dated June 4, 2013.

2. The Office of Administrative Hearings ("OAH") erred in entering its Final Order in docket number 2013-AGO-0002, dated August 19, 2013, including entering the following findings of fact and conclusions of law:

   a. Finding of fact 6.11, including subfindings of fact 6.11.3, 6.11.4, 6.11.8.

   b. Finding of fact 6.16 through 6.29, inclusive.

   c. Conclusion of law 7.2.

   d. Conclusion of law 7.4 through 7.10, inclusive.

3. OAH erred in entering its order denying motion for clarification and reconsideration, dated October 9, 2013.

(2) Issues Related to Assignment of Error

1. Did the OAH err in affirming that the AG was authorized to expand its investigation beyond the Complainant's Request for Dispute Resolution to investigate other potential violations on behalf of nonparties who had not filed a complaint or sought dispute resolution under RCW 59.30.040(1) and (3)?

2. Did the OAH improperly define the scope of its review, to preclude evidence and avoid ruling on issues relevant to whether Rainier Vista violated the Manufactured/Mobile Home Landlord-Tenant Act, RCW ch. 59.20 ("MHLTA")?

3. Did the OAH err by requiring that Rainier Vista reimburse its tenants $88,445.77, when MHDRP's Notice of Violation required Rainier Vista to reimburse its tenants $35,240.00, and the complainant's alleged overcharge was not more than $1,796.11?

4. Did the OAH apply an arbitrary calculation to pro rate Rainier Vista's actual utility costs by lot, rather than by the number of occupants identified by each tenant's rental agreement?

5. Did the OAH err when it interpreted RCW 59.20.070(6) to rule: (i) that the term "actual utility costs" in this case only includes and is limited to the City of Lacey's water bill; and (ii) that the term "actual utility costs" does not include any costs incurred by Rainier Vista to install, maintain, and repair its Water Service?

C. STATEMENT OF THE CASE

(1) Background Facts

Rainier Vista is a manufactured home community comprising 151 lots, located in Olympia, Washington. AR 580. The Complainant, Lucila

Santiago, entered into a one-year rental agreement with Rainier Vista for Lot 53, effective January 1, 2009. AR 587-88. Pursuant to the rental agreement, Santiago and Hilda Berumen are named as tenants, and two additional persons, Andres Zavala and Adela Cruz, are named as occupants for a total of four persons. AR 587.

Santiago's rental agreement contains the following provision:

> 2. ADDITIONAL CHARGES. In addition to the monthly rental and any other charges or fees specified in this agreement, Tenant agrees to pay to Landlord the following charges: Water Service.

Rainier Vista purchases water and receives a bi-monthly bill from the City of Lacey. AR 581-82. The City provides water to a single meter at Rainier Vista. Rainier Vista provides the utility infrastructure and is responsible for the maintenance of its private water distribution and sewer system ("Water Service"). *Id.* Rainier Vista's water service infrastructure distributes water from the City's meter to each lot in Rainier Vista, and distributes used water from each lot to public sewer lines. *Id.*

To calculate the additional charge for water service in the rental agreement, Rainier Vista divides the total water charges by the number of occupants residing in Rainier Vista, and issues a monthly statement to the tenants. Because more occupants generally means more water usage, in order to avoid overcharging low-occupant lots water service is prorated by the number of occupants that reside in each lot. AR 581. Over time, as Rainier

Vista monitors and continues to bill for water service, it reconciles its actual water costs to what the tenants paid, and adjusted its billing either up or down accordingly so as to not bill more than its actual utility costs. AR 581-82.

Rainier Vista operates on a cash accounting basis. From January 1, 2010 to November 14, 2012, Rainier Vista paid $363,528 to the City of Lacey for water for the period. AR 605. For the period from January 1, 2010 to October 31, 2012 (last charge was 10/27/12), Rainier Vista received a total of $358,082 from the tenants. AR 581-82, 608-78. In addition, Rainier Vista incurred other costs related to maintenance of its water service, invoicing and collections. AR 582.

Over a six-year period, 2007–2012, payments made to the City of Lacey for water totaled $618,719.49. AR 692-93. Additional expenses for sewer for the same period were $23,954.87.[2] AR 694. Thus, the direct provision of water service cost Rainier Vista at least $642,674.36 over six years, not counting even administrative and other costs. AR 582. Payments made by tenants for their water service totaled $641,238.03. AR 694. Rainier Vista did not make a profit on providing water service at any time relevant to this matter.[3]

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[2] Expenses for sewer are a necessary and direct expense of providing water service. Rainier Vista could not provide water service without also providing a means to dispose of the water.

[3] Rainier Vista reconciled its actual water costs to what the tenants paid, and adjusted its billing either up or down accordingly so as to not bill more than its actual utility costs. AR 581-82.

Beginning in 2007, MHDRP had several opportunities to review Rainier Vista's billing practices. AR 590-92. In each case, the formula to determine the amount of water service was the same. In each prior case, MHDRP closed its investigations without finding any violation of RCW 59.20.070(6). *Id.* In reliance on MHDRP's prior closed investigations, Rainier Vista continued its practice. *Id.* However, as explained below, MHDRP reversed its prior legal interpretations after a new Assistant Attorney General was assigned to its agency in 2012.

(2) Santiago's Complaint to MHDRP and the Dispute Resolution Process

On or about June 10, 2011, Santiago filed a Request for Dispute Resolution with MHDRP, and complained that her water service charges were excessive. AR 3–6. Santiago's rental agreement identified four occupants that used water, and Rainier Vista calculated her water service charge based on the actual number of occupants in Santiago's home. AR 581, 587.

Contrary to its past determinations, MHDRP asserted that Rainier Vista could only charge what it paid to the City of Lacey for water, and that Rainier Vista could not include any other costs it incurred to provide water service, or any administrative expenses. MHDRP also asserted that it could expand its dispute resolution to include not only Santiago, but all tenants. AR 906–21.

Rainier Vista responded that: (1) RCW 59.20.070(6) allows a landlord to pass through both the direct cost of the water and the costs incurred in delivering the water to the tenant's space and disposing of the water used; and (2) the AG lacked authority under RCW 59.30 to expand the scope of Santiago's complaint to include additional parties who have not complained or requested dispute resolution by MHDRP. AR 906–21.

MHDRP rejected Rainier Vista's interpretation of RCW 59.20.070(6) and RCW 59.30, and issued its Notice of Violation that Rainier Vista had charged for water service in excess of "actual utility costs" in violation of RCW 59.20.070(6). AR 7-10. The Notice of Violation alleges one violation of RCW 59.20.070(6) by one complainant, Santiago. AR 7. But, MHDRP's Corrective Action required Rainier Vista to reimburse all tenants the alleged overcharge amount of $35,240 for the period from January 2010 through October 2012. AR 9. The MHDRP investigator did not investigate or consider any utility costs other than the City's water bill. AR 8; CP 121. Based on MHDRP's legal interpretation, Santiago's alleged overcharge was either $1,796.11, $1,617.50, $544.15, or $1,701.26 depending on which method of calculation was imposed. *See* AR 1735, 1738, 1759-63.

(3) Appeal to OAH

Rainier Vista timely appealed the Notice of Violation to the OAH pursuant to RCW 59.30.040 on December 26, 2012. AR 13. The appeal challenged the AG's interpretation of RCW 59.20.070(6) and the scope of the

AG's authority under RCW 59.30.040 to expand its investigation of one request for dispute resolution by one complainant to 150 other tenants who were never parties to this proceeding.

In the administrative appeal before the OAH, the parties completed a prehearing conference, a partial summary judgment hearing, a motion for reconsideration of partial summary judgment, an administrative hearing, and Rainier Vista's motion for clarification and reconsideration of the final order. CP 14, 28, 47, 63, 741. The hearing examiner ruled on partial summary judgment that MHDRP had authority to impose a remedy on behalf of non-complaining tenants as a class. CP 37-38. The hearing examiner also stated that MHDRP's interpretation of RCW 59.20.570(6) was correct, and that Rainier Vista could only charge tenants for the actual cost of the water itself, and not the sewer or other infrastructure and administrative costs actually providing that water to tenants. CP 39. Although this partial summary judgment ruling would seem to preclude any evidence of Rainier Vista's actual costs of delivering water to tenants, the hearing examiner allowed Rainier Vista to present evidence of its other costs at the damages hearing. CP 52-54.

At the hearing, the examiner rejected all of Rainier Vista's undisputed evidence about its costs for providing water to tenants because some of it was "estimated." CP 54 (Finding of Fact 6.11). The hearing examiner also rejected documented water service expenses because they did not pertain

exclusively to water. CP 53-55. However, rather than simply affirming MHDRP's $35,000 reimbursement order, OAH imposed a different remedy of more than twice that amount by changing the method of calculating the reimbursement. CP 58-59, 882-94. Reconsideration was denied. CP 64.

Rainier timely filed an appeal to the superior court. That court agreed with Rainier that MHDRP exceeded its statutory authority by ordering relief to tenants who had not filed complaints against Rainier. CP 914-15. However, the superior court agreed with MHDRP that Rainier was not permitted to charge Santiago for any costs associated with water service other than the actual prince of the water charged by the City. *Id.*

The MHDRP appealed from the superior court's decision. CP 910. Rainier Vista cross-appealed, challenging the ruling that OAH properly interpreted the applicable statute regarding utility costs. CP 917-20.

D. SUMMARY OF ARGUMENT

The OAH and the MHDRP both committed *ultra vires* actions wholly outside their respective statutory authorities. RCW 59.30.040(4) limits MHDRP's authority to review a complainant's allegation and provide a streamlined resolution; the legislature rejected MHDRP's request to grant it powers to resolve "class complaints." Yet the MHDRP used a truncated process, devoid of any civil procedure protections, to act as attorney, prosecutor, judge, and jury in a major class action against

Rainier Vista. RCW 59.30.040(1). The MHDRP also ignored the plain language of the MHLTA.

To exacerbate MHDRP's errors, OAH committed a separate *ultra vires* action and imposed a remedy beyond the scope of the notice of violation. OAH also violated the scope of review and shifted the burden of proof from the MHDRP to Rainier Vista.

Both MHDRP and OAH erred when they ruled that the MHLTA prohibits a landlord from including in rental agreements infrastructure and other utility costs beyond the price of the utility. The MHLTA allows landlords to include in rental agreements charges for "actual utility costs," which include the cost of maintaining and administering the private infrastructure necessary to deliver those utilities to the tenants.

Finally, OAH's order is not supported by substantial evidence when viewed in light of the whole record, and is arbitrary and capricious. The hearing examiner rejected wholesale Rainier Vista's undisputed evidence regarding the costs of its water service because some of the evidence was estimated. There is no rational basis in law for rejected evidence solely because it is estimated, and doing so was arbitrary and capricious. It also rendered the order contrary to the preponderance of evidence.

E. ARGUMENT

(1) Standards of Review

An appeal from a Notice of Violation issued under the MHDRP is governed by the Administrative Procedure Act ("APA") at RCW ch. 34.05. RCW 59.30.040(10). Judicial review of the decision here is governed by RCW 34.05.570, which provides that an agency's decision shall be reversed if any of the following apply (in relevant part):

> (a) The order, or the statute or rule on which the order is based, is in violation of constitutional provisions on its face or as applied;
>
> (b) The order is outside the statutory authority or jurisdiction of the agency conferred by any provision of law;
>
> ...
>
> (d) The agency has erroneously interpreted or applied the law;
>
> (e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter;
>
> (f) The agency has not decided all issues requiring resolution by the agency; or
>
> ...
>
> (i) The order is arbitrary or capricious.

RCW 34.05.570(3).

With respect to the scope of MHDRP's authority and the statutory violation of RCW 59.20.070(6), the OAH ruled on summary judgment.

CP 30. Thus, this Court reviews those issues *de novo* and takes all facts in the light most favorable to non-moving party. *Eastlake Cmty. Council v. City of Seattle*, 64 Wn. App. 273, 276, 823 P.2d 1132, *review denied*, 119 Wn.2d 1005, 832 P.2d 488 (1992). Specifically relating to the issue of the MHDRP's statutory authority, this Court affords the agency no deference. *In re Elec. Lightwave, Inc.*, 123 Wn.2d 530, 540, 869 P.2d 1045 (1994) ("we do not defer to an agency the power to determine the scope of its own authority).

Regarding the issue of determining the amount of the alleged overcharge, the OAH resolved that issue after a hearing. In an appeal from an administrative decision, this Court reviews the agencies' legal conclusions *de novo*, including whether findings of fact support conclusions of law, whether the law was applied correctly, and whether a decision was arbitrary or capricious. *Hickethier v. Washington State Dep't of Licensing*, 159 Wn. App. 203, 244 P.3d 1010 (2011).

This Court's review of the decision regarding the propriety of MHDRP's imposed remedy should take into account the burden of proof: MHDRP had the burden to prove that its Notice of Violation was supported by a preponderance of evidence. RCW 59.30.040(10)(b). Findings of fact are reviewed for substantial evidence in light of the whole record. RCW 34.05.570(3)(e). Substantial evidence is evidence that is

sufficient to persuade a fair-minded person of the truth or correctness of the matter. *King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, 553, 14 P.3d 133 (2000).

(2) The OAH and the MHDRP Both Committed *Ultra Vires* Actions Wholly Outside Their Respective Statutory Authorities

The order issued by OAH should be reversed because: (1) it violates the due process protections of the Washington and United States Constitutions (RCW 34.05.570(3)(a)); (2) it is outside the statutory authority and jurisdictions of the MHDRP and OAH (RCW 34.05.570(3)(b)); and (3) it erroneously interpreted or applied the law (RCW 34.05.570(3)(d)); "The power and authority of an administrative agency is limited to that which is expressly granted by statute or necessarily implied therein." *McGuire v. State,* 58 Wn. App. 195, 198, 791 P.2d 929 (1990); *Conway v. Washington State Dep't of Soc. & Health Servs.*, 131 Wn. App. 406, 419, 120 P.3d 130 (2005), *as amended on reconsideration in part* (Feb. 24, 2006). When an agency acts outside its explicit or implicit powers, the act is *ultra vires* and void. *S. Tacoma Way, LLC v. State*, 169 Wn.2d 118, 122-23, 233 P.3d 871 (2010).

Our Supreme Court has long distinguished between *ultra vires* and merely irregular acts. *Wendel v. Spokane County,* 27 Wash. 121, 123-24, 67 P. 576 (1902). In *Wendel,* the Court held that if a municipal corporation has the general authority to perform an action, but does so in an illegal or

improper manner, the action is not *ultra vires*. Over the years, the Court repeatedly upheld this distinction, maintaining that a government action is truly *ultra vires* only if the agency was without authority to perform the action. *Bd. of Regents v. City of Seattle,* 108 Wn.2d 545, 552, 741 P.2d 11 (1987) ("An act of an officer which is within his realm of power, albeit imprudent or violative of a statutory directive, is not ultra vires."); *Haslund v. City of Seattle,* 86 Wn.2d 607, 622, 547 P.2d 1221 (1976) ("An ultra vires act is one performed without any authority to act on the subject."); *Finch v. Matthews,* 74 Wash.2d 161, 172, 443 P.2d 833 (1968) (stating that an entity is bound by "acts which are within the scope of the broad governmental powers conferred, granted or delegated, but which powers have been exercised in an irregular manner or through unauthorized procedural means").

However, when an agency acts in the absence of statutory authority, the doctrine still applies. *S. Tacoma Way*, 169 Wn.2d at 122-23. *Ultra vires* acts, performed with no legal authority, are void because no power to act existed, even if proper procedural requirements were followed. *Id. Ultra vires* acts cannot be validated by later ratification or events. *Id.*

In cases when the scope of an agency's authority is unclear, this Court may also look to legislative history to discern legislative intent. *State v. Grays Harbor County*, 98 Wn.2d 606, 607-08, 656 P.2d 1084 (1983) (*citing Whitehead v. Dep't of Soc. & Health Servs.*, 92 Wn.2d 265, 268, 595 P.2d 926 (1979); *Ropo, Inc. v. City of Seattle*, 67 Wn.2d 574, 577, 409 P.2d 148

(1965); *Garrison v. Wash. State Nursing Bd.*, 87 Wn.2d 195, 196, 550 P.2d 7 (1976)). When the Legislature clearly and consciously makes a substantive choice to reject certain language, there should be a strong presumption that the legislative action is an indication of intent.

(a) RCW 59.30.040 Limits MHDRP's Authority to Review a Complainant's Allegation and Provide a Streamlined Resolution; the Legislature Rejected MHDRP's Request to Grant It Powers to Resolve "Class Complaints"

The AG administers the MHDRP. RCW 59.30.030(1). Created in 2007, the MHDRP was intended to provide an equitable, as well as a "less costly" and "more efficient," way for manufactured home tenants and landlords to resolve disputes. RCW 59.30.010(3).

The legislative intent in RCW 59.30 is to resolve disputes between landlords and tenants. The scope of MHDRP's authority is limited to reviewing and resolving disputes about alleged violations of RCW ch. 59.20. RCW 59.30.030(1). The statement of purpose is:

> The purpose of the manufactured/mobile home dispute resolution program is to provide manufactured/mobile home community landlords and tenants with a cost-effective and time-efficient process to resolve disputes regarding alleged violations of the manufactured/mobile home landlord-tenant act.

RCW 59.30.030(2). However, the Legislature has mandated individual dispute resolution, not generalized investigation and enforcement. RCW 59.30.040(3).

If dispute resolution fails, MHDRP does have authority to investigate complaints to determine whether the MHLTA has been violated. RCW 59.30.040(1) and (3). However, that authority is limited to investigating one tenant's complaint. RCW 59.30.040(3). The burden of proof is on MHDRP to defend its Notice of Violation, and identify a sufficient factual and legal basis to proceed to hearing on the Landlord's alleged violation of the MHLTA. *See* RCW 59.30.040(10)(b). The MHDRP, after investigation of the complaint, must then make a written determination.

MHDRP's assumption of class-action authority improperly transforms what was meant to be a simple and streamlined process for resolving individual tenant disputes into a method to impose tens or even hundreds of thousands of dollars in damages against landlords without even the most basic civil procedure protections.[4] If other tenants believe that their landlord is violating the MHLTA, and they want to take action as a class, the MHDRP enabling legislation reserves to them their full rights to file a lawsuit. RCW 59.30.040(13).

MHDRP is not delegated authority outside the context of an individual tenant's complaint. RCW 59.30.040(1). MHDRP's authority under Chapter 59.30 RCW is predicated upon an individual tenant filing an

[4] Not only is the MHDRP process completely outside the civil rules, OAH asserts the agency has total "discretion" as to what facts to investigate and consider. CP 37, 66.

individual request for dispute resolution. MHDRP does not have authority under RCW 59.30.040(1) to investigate class complaints that were not submitted by any tenant. The only complainant in this action is Lucila Santiago. MHDRP alleges that the complainant was overcharged by not more than $1,796.11. AR 932–33. But, MHDRP unilaterally expanded the scope of its delegated authority to advocate on behalf of other nonparty tenants who had not requested dispute resolution. MHDRP ignored the Legislature's intent that MHDRP be a facilitator of an individual tenant's dispute rather than class action counsel for all tenants. OAH affirmed MHDRP's *ultra vires* actions. AR 1640, 1792-94.

Not only does the text of RCW Ch. 59.30 lack support for MHDRP's claimed authority to act on behalf of all Rainier Vista's non-complaining tenants as a class, the Legislature has *expressly rejected* the agency's request for authority to investigate and resolve class complaints. In 2009, the MHDRP sought legislative change to expressly give it authority to investigate park-wide alleged violations of RCW 59.20.[5] AR 894, 899. The Legislature

[5] *See* 2009 MHDRP Annual Report to the Washington State Legislature, pp. 10-11:

> The MHU recommends the following changes to chapter 59.30, RCW:
>
> ...
>
> We would like to add a section allowing the MHU to investigate potential violations that are discovered during the course of an existing formal investigation, but for which we have not received a formal complaint. We have found that often complainants are not aware of their rights under the MHLTA and when the MHU Investigator does a site visit other violations may become obvious by

rejected the AG's request. AR 889. The original bill would have delegated the AG with the legal authority to investigate on behalf of non-party tenants The substitute bill would have limited MHDRP's authority to investigate suspected park-wide violations to those that affect the health, safety, and welfare of its residents. AR 897–904. Thus, the Legislature reaffirmed its intent in enacting RCW ch. 59.30: MHDRP's delegated authority is limited to investigating requests for dispute resolution by individual tenants.

In fact, the MHDRP has acknowledged that it lacks the authority it now purports to agency asserts. In its 2009 Annual Report, MHDRP admitted that it lacked authority under RCW 59.30 to investigate class complaints when it proposed new legislation to create that authority. CP 837.

The rejection of MHDRP's bill means that MHDRP's assertion of class authority in this matter is unsustainable: the Legislature has not given the AG the power to investigate park-wide violations in the course of an existing dispute resolution. *Washington State Human Rights Comm'n ex rel., Spangenberg v. Cheney Sch. Dist. No. 30*, 97 Wn.2d 118, 123, 641 P.2d 163, 166 (1982) (Court found that rejection of a bill that would have allowed the Human Rights Commission to assess damages for mental suffering implied that the Legislature did not want the tribunal to have the power to award such

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> simply walking around the community. The MHU requests guidance on how to handle this situation.

CP 837.

damages). AR 889.

This Court has recently held an award of attorney fees in arbitration *ultra vires*, in circumstances highly analogous to this case. *Washington State Dep't of Transp., Ferries Div. v. Marine Employees Comm'n*, 167 Wn. App. 827, 842, 274 P.3d 1094 (2012). That case originated as a lawsuit by several maritime workers who filed a grievance regarding wages for time spent on "watch turnover" when shifts changed. *Marine Employees,* 167 Wn. App. at 829. This Court ultimately ruled that the time was compensable. *Id.* at 830. Soon thereafter, the union – on behalf of the class of workers – brought a grievance under a collective bargaining agreement ("CBA") requesting the back wages all of its members spent on "watch turnover." *Id.* at 830. The CBA at issue expressly prohibited an award of attorney fees to either party. *Id.* at 836. However, the arbitrator *sua sponte* imposed an attorney fee award on the employer, contending that the employer, in refusing to follow this Court's opinion and seeking arbitration, had committed an unfair labor practice and that a statutory attorney fee award was warranted. *Id.* at 842.

This Court held that the arbitrator's action in imposing attorney fees to remedy the perceived unfair labor practice was *ultra vires:*

> Although [the union] makes a compelling argument that the [employer] was inexcusably recalcitrant in addressing shift change wages and that the sanction of awarding attorney fees was appropriate, the parties' CBA expressly deprives

> the [] arbitrator of authority to do this. Further, nothing in case law or our review of applicable statutes and administrative rules leads us to conclude that an [] arbitrator may *sua sponte* address an unfair labor practice in a grievance arbitration. Accordingly, we hold that the [parties] were bound to their bargained agreement and the [] arbitrator acted *ultra vires* in awarding attorney fees...

Id. at 842.

In this case, MHDRP issued a notice of violation alleging one violation of RCW 59.20.070(6) by one complainant, Santiago, and alleged that the parties were not able to negotiate a resolution. AR 7. It did not allege, among other items, that the "nature of the fees" was inadequately described, or that there was a legal basis to join 150 other tenants who had not sought dispute resolution or complained to MHDRP.

MHDRP had no authority under RCW 59.30 to transform its statutorily limited investigation of one request for dispute resolution by one complainant into a class action on behalf of 150 other non-complaining, non-party tenants. The OAH erred when it ruled that MHDRP had statutory authority to expand the Notice of Violation beyond what Santiago sought and fashion a remedy for all tenants. AR 1640. Accordingly, the Court should reverse the OAH Decision and dismiss MHDRP's Notice of Violation.

(b) <u>The Remedy OAH Imposed Goes Beyond the Scope of the Notice of Violation and Is a Separate *Ultra Vires* Action</u>

The scope of OAH's review of a Notice of Violation is also statutorily circumscribed:

> The administrative law judge appointed under chapter 34.12 RCW shall:
>
> (a) Hear and receive pertinent evidence and testimony;
>
> (b) Decide whether the evidence supports the attorney general finding by a preponderance of the evidence; and
>
> (c) Enter an appropriate order within thirty days after the close of the hearing and immediately mail copies of the order to the affected parties.

RCW 59.30.040(10).

This administrative proceeding started with the Notice of Violation which alleges as follows:

> 1. Rainier must, within thirty (30) days from receipt of this Notice, reimburse tenants the amount it overcharged for water for the period of 2010, 2011, and part of 2012: $35, 240. Rainier may not pass this expense on to tenants.
>
> 2. Rainier must, within forty-five (45) days from receipt of this Notice, submit to the MHDRP copies of the reimbursement checks it distributes to tenants that show the amount refunded.
>
> 3. Rainier must, for six (6) months following receipt of this Notice, submit to the MHDRP copies of the water bill from the City of Lacey and copies of the invoices Rainier submits to its tenants for water.

AR 9. At the hearing, MHDRP argued that the penalty of $35,240 should be upheld, although it argued that the "more equitable method of distributing

refunds is to distribute the $35,240 to only the tenants who were overcharged." AR 1732-55. But, in calculating its final order, OAH required that Rainier Vista reimburse $88,445.77. *See* MHDRP's post-hearing calculation, MHDRP's Opposition to Motion for Stay, Attachment 1 (CP 97-109). Thus, the final order did not merely affirm the MHDRP's Notice of Violation, it acted *sua sponte* to more than double the penalty. AR 1796.

Even assuming *arguendo* MHDRP had "class action" authority to impose a remedy for non-complaining tenants, OAH was not allowed to impose a different remedy of $88,445.77, which exceeds the scope of its authority under RCW 59.30.040. RCW 59.30.040(10) does not give OAH the authority to increase the reimbursement sought by MHDRP in its Notice of Violation from $35,240.00 to $88,445.77. OAH's authority is limited to deciding whether the evidence supports MHDRP's Notice of Violation for $35,240. RCW 34.05.020 prohibits OAH from violating RCW 59.30.040(10). *See* RCW 34.05.020 ("Nothing in this chapter may be held to diminish the constitutional rights of any person or to limit or repeal additional requirements imposed by statute or otherwise recognized by law").

This Court has already addressed this issue in a similar context. In *Conway,* the Department of Social and Health Services ("DSHS") revoked the license of an adult family home operated by Helen Conway. *Conway,* 131 Wn. App. at 409. Conway challenged the revocation, and the ALJ concluded that instead of total revocation, Conway's license should be limited to one

adult family home. *Id.* The DSHS Board of Appeals concluded that the ALJ lacked authority to choose a remedy, because by statute that authority rested solely with DSHS. *Id.* This Court agreed with the Board:

> [W]e agree with DSHS that the ALJ exceeded her authority "when she substituted her judgment for that of the Department in choosing which remedy to impose against [Conway] for her violation of the Department's regulations. ... The Legislature delegated the discretionary authority to impose a remedy under RCW 70.128.160 to DSHS only. The ALJ had authority to review the propriety of DSHS's discretionary decision to revoke Conway's license, but did not have the authority to impose a different remedy.

Id. at 419.

RCW 59.30.040(10) does not give OAH the authority to increase the reimbursement sought by MHDRP in its Notice of Violation from $35,240.00 to $88,445.77. OAH's authority in this matter was limited to deciding whether the evidence supported MHDRP's Notice of Violation for $35,240. RCW 34.05.020 prohibited OAH from violating RCW 59.30.040(10). *See* RCW 34.05.020 ("Nothing in this chapter may be held to diminish the constitutional rights of any person or to limit or repeal additional requirements imposed by statute or otherwise recognized by law").

Because MHDRP's investigation was defective from its inception, the Court should reverse the OAH Decision and dismiss MHDRP's Notice of Violation. Alternatively, the Court should reverse OAH's Final Order for $88,445.77, and either reduce any reimbursement to $1,796.11 as sought by the Complainant, or to $35,240 as sought by MHDRP in its Notice of

Violation. AR 1738, 1735; MHDRP's Opposition to Motion for Stay, Attachment 1, pp. 2, 6, 10.

(c) Each Agency's *Ultra Vires* Action Also Violated Rainier Vista's Due Process Rights

The OAH's order: (1) violates constitutional provisions (RCW 34.05.570(a)), and (2) is arbitrary and capricious (RCW 34.05.570(3)(i)).

When an administrative agency takes money from a citizen without statutory basis, and without giving the citizen a fair opportunity to be heard, the action violates due process. *State v. Adams*, 107 Wn.2d 611, 615, 732 P.2d 149 (1987). In *Adams,* our Supreme Court held that unilateral action by the state in deducting reasonable amounts from employees' subsequent paychecks in seeking to recover alleged overpayments of shift differential premium paid to employees for working evening or night shifts constituted a violation of the employees' constitutional right to due process. *Id.*

It is true that in *Adams* there was absolutely *no* statutory procedure for contesting the state's action, whereas here there is at least the ability to challenge MHDRP's action in an APA administrative hearing. MHDRP would surely attempt to distinguish *Adams* on that ground.

However, *Adams* is relevant here because OAH's interpretation of the MHDRP's investigative and sanctioning powers denies due process as applied. OAH ruled on summary judgment that the MHDRP had discretion to decide what facts to investigate. CP 37, 66. OAH also

agreed with MHDRP on summary judgment that RCW 59.20.070 allowed Rainier Vista to collect from tenants only the cost of water, and not any attendant infrastructure or administrative costs in actually getting the water to and from the tenants, despite claiming to objectively hear Rainier Vista's evidence on this point at the hearing. CP 39, 54. Thus, any appearance of due process offered by RCW ch. 59.39 is an illusion.

The "due process" afforded here is also illusory because although the OAH heard Rainier Vista's evidence regarding the actual utility costs at the hearing, OAH was "reviewing" a factual dispute outside the scope of the Notice of Violation and OAH's own prehearing order in doing so. Thus, in a strange turn of events, OAH committed an error and acted *ultra vires* in allowing Rainer Vista to present evidence on the issue of the infrastructure and administrative costs. But this accidental benefit is not provided to Rainier Vista by the statute, and thus MHDRP's and OAH's actions were unconstitutional as applied.

From the outset of this matter, MHDRP refused to investigate Rainier Vista's administrative, capital expenditures, and maintenance costs to provide water service. AR 8, 906-21. At hearing, MHDRP offered no evidence to contradict Rainier Vista's actual and estimated costs it incurred to provide Water Service. Still, it remained MHDRP's legal duty to investigate and its burden to prove that its Notice of Violation was supported by a

preponderance of evidence. *See* RCW 59.30.040(10)(b). Because MHDRP refused to investigate anything other than the City of Lacey's water bill, its Notice of Violation was defective from its inception.

But, instead of recognizing MHDRP's fatal defect in its investigation, the OAH improperly shifted MHDRP's duty to investigate and its burden of proof upon Rainier Vista. The procedural history of this protracted matter is entirely the result of MHDRP's erroneous interpretation of RCW 59.20.070(6). Since day one, MHDRP limited its investigation and evidence to the City of Lacey's bills to supply water to Rainier Vista. In doing so, it contradicted its earlier investigations by prior Assistant Attorneys General, and refused to investigate anything other than the City's water bills. AR 590–92.

Also, by requiring Rainier Vista to *prove* its actual utility costs at the hearing, rather than requiring MHDRP to prove its Notice of Violation by a preponderance of evidence, OAH violation RCW 59.30.040. MHDRP ignored Rainier Vista's sewer service, administrative expense, capital expenditures, and maintenance costs to provide water service. AR 7-9. MHDRP also purported to resolve this matter on behalf of non-complaining tenants as a class. Thus, the Notice of Violation was fatally flawed and unsupported by evidence from its inception. AR 1642-43, 1792, 1794-95.

Because MHDRP did not investigate all of Rainier Vista's "actual utility costs" to provide Water Service, it did not and could not satisfy its

burden of proving its Notice of Violation by a preponderance of evidence, and the OAH should not have shifted that burden to Rainier Vista to prove what MHDRP failed to investigate. That and the decision to allow MHDRP to act as class counsel for the tenants in a truncated process outside the civil rules violated Rainier Vista's due process rights.

(3) The OAH Erred When It Ruled That the MHLTA Prohibits a Landlord from Including in Rental Agreements Infrastructure and Other Utility Costs Beyond the Price of the Utility

The OAH's order is outside the statutory authority and jurisdiction of OAH and MHDRP (RCW 34.05.570(3)(b)) and erroneously interpreted the law (RCW 34.05.570(3)(d)).

OAH ruled on partial summary judgment that RCW 59.20.070(6) allows a landlord to charge tenants only for the actual cost of water charged by the City of Lacey, and not for the actual costs of infrastructure and labor to deliver that water to and from each tenants' home. CP 38. In other words, OAH concluded that the MHLTA prohibits charging tenants for the "actual utility costs" the landlord incurs, and that if Rainier Vista chooses to offer lower rent and have tenants pay only for actual utility costs, it must now provide water to the tenants at an operating loss. *Id.*

The Legislature crafted the MHLTA with a balanced legislative purpose: to maintain low-cost housing to benefit the elderly, while encouraging private investment in parks that will improve

mobile/manufactured home market options and growth. *Little Mountain Estates Tenants Ass'n v. Little Mountain Estates MHC LLC*, 169 Wn.2d 265, 270, 236 P.3d 193, 195 (2010). Permitting contractual provisions that provide stable rental terms yet offer "attractive yet profitable features" fulfills these dual goals. *Id.* To the same end, the common law preserves freedom of contract to both landlords and tenants, as long as the MHLTA is not contravened. *Id.* at 269 n.3.

The MHLTA provides that a rental agreement for a mobile/manufactured home space tenancy must include: "The terms for the payment of rent, including time and place, *and any additional charges to be paid by the tenant.* Additional charges that occur less frequently than monthly shall be itemized in a billing to the tenant." RCW 59.20.060(1)(a) (emphasis added). The rental agreement must also include: "A listing of *the utilities, services, and facilities* which will be available to the tenant during the tenancy *and the nature of the fees*, if any, to be charged." RCW 59.20.060(1)(i) (emphasis added).

> The Complainant's rental agreement provides:
>
> 2. ADDITIONAL CHARGES. In addition to the monthly rental and any other charges or fees specified in this agreement, Tenant agrees to pay to Landlord the following charges: Water Service.

Here, the issue is whether "water service" in paragraph 2 of the rental agreement means the complete service provided, rather than just the cost of

water, and whether the provision as interpreted by Rainier Vista expressly contradicts the MHLTA.

A rental agreement is a contract and courts will interpret it by using the rules of contract interpretation. *Cochran v. Lakota Land & Water Co.*, 171 Wash. 155, 163, 17 P.2d 861 (1933). "It is black letter law of contracts that the parties to a contract shall be bound by its terms." *Little Mountain*, 169 Wn.2d at 269 n.3, *citing Torgerson v. One Lincoln Tower, LLC*, 166 Wn.2d 510, 517, 210 P.3d 318 (2009) and *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 344, 103 P.3d 773 (2004).

To resolve mixed questions of law and fact, "the touchstone of contract interpretation is the parties' intent." *Tanner Electric Coop. v. Puget Sound Power & Light*, 128 Wn.2d 656, 674, 911 P.2d 1301 (1996). *Martinez v. Miller Indus., Inc.*, 94 Wn. App. 935, 942, 974 P.2d 1261 (1999). Words in a contract should be given their ordinary meaning. *Corbray v. Stevenson*, 98 Wn.2d 410, 415, 656 P.2d 473 (1982).

Courts interpret contracts as a whole. *Berg v. Hudesman,* 115 Wn.2d 657, 669, 801 P.2d 222 (1990); *Syrovy v. Alpine Res., Inc.,* 122 Wn.2d 544, 551, 859 P.2d 51 (1993). Courts interpret unambiguous contracts as a matter of law. *Paradiso v. Drake,* 135 Wn. App. 329, 334, 143 P.3d 859 (2006), *review denied,* 160 Wn.2d 1024, 163 P.3d 794 (2007). Ambiguity will not be read into a contract where it can reasonably be avoided. *McGary v. Westlake Investors,* 99 Wn.2d 280, 285, 661 P.2d 971 (1983); *Martinez*, 94 Wn. App.

at 944. A contract provision is not ambiguous merely because the parties suggest opposite meanings. *Id.* at 421.

Courts interpreting contracts give undefined terms "their 'plain, ordinary, and popular' meaning." *Boeing Co. v. Aetna Cas. and Sur. Co.,* 113 Wn.2d 869, 877, 784 P.2d 507 (1990) (quoting *Farmers Ins. Co. v. Miller,* 87 Wn.2d 70, 73, 549 P.2d 9 (1976)). A contract term's plain and ordinary meaning can be discerned by reference to dictionary definitions. *Queen City Farms, Inc. v. Cent. Nat'l Ins. Co.,* 126 Wn.2d 50, 77, 882 P.2d 703 (1994); *Wm. Dickson Co. v. Pierce Cnty.*, 128 Wn. App. 488, 493, 116 P.3d 409 (2005); *Martinez*, 94 Wn. App. at 945.

The term "service" in this context is defined in the Random House Webster's College Dictionary (1992) as "supplying or supplier of utilities, commodities or other facilities that meet a public need, as water, electricity, communication, or transportation." It is also defined as "the organized system of apparatus, appliances, employees, etc., for supplying some accommodation required by the public." *Id.*

Here, MHDRP did not offer *any* testimony by the Complainant or consider what the parties' intended "water service" to mean. But, the rental agreement itself confirms that the parties intended an Additional Charge for Water Service. The Additional Charge pertains to water *service*, not just *water*. Inherent in the term "service" is the entirety of the infrastructure and labor required to supply water to the tenants as well as its disposal. There is

no language in the Complainant's rental agreement that suggests that "water service" only includes the cost of the water as billed by the City, nor did MHDRP offer any evidence that the term "water service" is not descriptive of the nature of the fees under RCW 59.20.060(1).

RCW 59.20.070(6) expressly authorizes a landlord to charge a tenant for "actual utility costs." A landlord may increase or impose a utility fee in addition to rent so long as it did not exceed the actual cost "of the service":

> So long as utility charges do not exceed the actual cost *of the service* and fees and charges are not retaliatory, the statute permits the landlord to impose them.

McGahuey v. Hwang, 104 Wn. App. 176, 183, 15 P.3d 672, *review denied*, 144 Wn.2d 1004 (2001). Notice this Court did not say actual cost "of the utility provided," as the OAH did here. This Court has expressly ruled that fees for utility service – even when those fees exceed the actual cost of the utility itself – are not prohibited by the MHLTA:

> For example, the landlord may not charge a utility fee in excess of actual utility cost or increase a tenant's obligations or decrease services in retaliation for a tenant's good faith lawsuit or membership in a homeowners association. *And even these provisions, which relate directly to the kinds of services and charges at issue here, do not bar increases or changes in fees.*

Id. (emphasis added).

The Legislature, in drafting the MHLTA, understood the meaning of the term "costs" and used it in other sections of the statute. For example, RCW 59.20.210 allows tenants to deduct from their rent the "costs" of

repairing a defective condition. RCW 59.20.220 similarly refers to "costs" of repair. RCW 59.20.140 refers to the "costs" of extermination. None of these statutes provide that "costs" include the actual raw material but exclude labor and other costs. Nevertheless, with respect to utilities only, MHDRP and OAH consider the "actual costs" of utilities to be only the "raw materials" (the actual water) and not the infrastructure or labor provided in delivering those raw materials to the tenant.

Also, under the MHLTA landlords have the legal *duty* to maintain and repair its private water distribution and disposal lines, all the way from the City of Lacey's meter to and from each of the 151 individual spaces at Rainier Vista. RCW 59.20.130(6). That duty alone is evidence that the Legislature knows that "actual utility costs" mean more than just what a landlord pays a municipality for water. The time and expense of maintenance of the system are also "actual costs," as are the administrative costs of billing and collections.

Here Rainier Vista's lease imposes charges for "water service." Rainier charges tenants only for the actual cost of that "service." The plain language of RCW 59.20.070(6) states "actual utility costs" in the plural. It could mean either public or private electricity, garbage, or as in this case, the costs of "water service" when read in connection with the rental agreement. The costs of such water service are permissible charges under the MHLTA.

Indeed, RCW 59.20.130 provides in relevant part:

> It shall be the duty of the landlord to:
> ....
> (6) Maintain and protect all utilities provided to the mobile home, manufactured home, or park model in good working condition.

Rainier Vista's "actual utility costs" comport with its above legal duties and include capital expenditures and operating expenses that are over and above what it paid the City of Lacey to provide water. MHDRP refused to recognize these attendant costs from the outset of this matter, based on its incorrect interpretation of RCW 59.20.070(6). OAH approved MHDRP's faulty statutory interpretation on summary judgment. This legal interpretation was error.

To accept OAH's interpretation of RCW 59.20.070(6) would convert the plural "*actual utility costs*" as it is written, to the singular "*actual cost of the utility*" as the AG interprets it. Because the rental agreement itself confirms the parties' intent that Water Service include additional charges for both the cost of water and the entirety of the infrastructure and labor to supply and dispose of water, and it is undisputed that MHDRP failed to investigate any utility cost other than what the City billed Rainier Vista, MHDRP's investigation was defective from its inception and should be dismissed.

(4) OAH's Order Is Not Supported by Substantial Evidence When Viewed in Light of the Whole Record, and Is Arbitrary and Capricious

OAH's orders are not supported by substantial evidence (RCW 34.05.570(3)(e) and are arbitrary and capricious (RCW 34.05.570(3)(i)).

Seymour v. Washington State Dep't of Health, Dental Quality Assur. Comm'n, 152 Wn. App. 156, 172, 216 P.3d 1039 (2009).

MHDRP ignored the undisputed fact that Rainier Vista pays to acquire water from the City of Lacey at its single water meter, so that Rainier Vista may then maintain and administer its own private utility to provide water service from the City's water meter to and from the Santiago's lot. AR 7-9.

At OAH, despite the somewhat confusing nature of the hearing examiner's prehearing orders, which suggested that evidence of Rainier Vista's actual utility costs beyond the cost of water would not be permitted at the hearing, Rainier Vista did present substantial and undisputed evidence of those costs at the hearing, in the form of testimony and documents. CP 53-54; AR 581-82, 693-94, 698-99.

However, the hearing examiner categorically rejected all of Rainier Vista's evidence, and allowed no offset, stating that the evidence was insufficient to support "identifiable expenses for the cost of water." CP 53-54. Because, in the hearing examiner's view, the evidence was insufficiently precise, it was rejected wholesale. *Id.* The OAH arbitrarily concluded that it is impossible to estimate utility costs. AR 1790-91, 1793, 1796.

While a hearing examiner certainly has discretion to make

credibility determinations, that is not what occurred here. The hearing examiner did not disbelieve Rainier Vista's evidence, but faulted some if it as being "estimated" rather than definitive. For example, the hearing examiner acknowledged that Rainier Vista provided evidence of precise infrastructure costs for "plumbing," but faulted Rainier Vista because the receipt did not "separate" the plumbing costs from the septic costs. CP 54. Also, although Rainier Vista did provide receipts and other documentary evidence of some of its costs associated with providing water, the hearing examiner inexplicably rejected it, rather than reducing the notice of violation based at least on those costs that were documented. CP 54.

The hearing examiner's decision to reject all of Rainier Vista's evidence because some of it was estimated was arbitrary and capricious. There is no rational legal basis for categorically rejecting undisputed evidence simply because it is estimated. The use of estimated evidence to demonstrate costs or damages is routine and uncontroversial. *See, e.g., State v. Smith*, 25 Wn.2d 540, 542, 171 P.2d 853 (1946) ("damages occasioned to the condemnee by the taking are estimated as of the time of the taking"); *Forest Mktg. Enterprises, Inc. v. State, Dep't of Nat. Res.*, 125 Wn. App. 126, 137, 104 P.3d 40 (2005) ("Thus, DNR estimates its actual damages were approximately $350,000 by subtracting $662,440 (estimated resale value) from $1,013,000 (contract value). Formark

offered no evidence to contradict DNR's damage estimates."); *Eagle Group, Inc. v. Pullen*, 114 Wn. App. 409, 419, 58 P.3d 292 (2002) (testimonial evidence based on estimates, supported by some documentation, was admissible and for the jury to weigh); *Hill v. Cox*, 110 Wn. App. 394, 401, 41 P.3d 495 (2002) ("During trial, the Estate's expert estimated damages at $3,185...Mr. Hill's expert estimated those damages at $121,372.80. ...The jury is given considerable latitude in making its determination when the subject matter is difficult of proof and cannot be fixed with mathematical certainty."); *Eagle Point Condo. Owners Ass'n v. Coy*, 102 Wn. App. 697, 703, 9 P.3d 898 (2000) ("The estimate of $34,174 for flashing and trim provided the court with a reasonable basis to estimate that the cost for flashing alone was about half that amount. The award of $43,000, for flashing and siding together, is in the range of the evidence and is affirmed.").

Rainier Vista presented undisputed evidence regarding its actual utility costs in providing water to tenants. The hearing examiner's decision to completely reject that evidence on the grounds that some of it was "estimated" was arbitrary and capricious, and contrary to the preponderance of evidence.

F. CONCLUSION

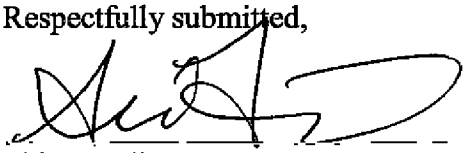
MHRDP's "investigation" and notice of violation, and OAH's ratification and exacerbation of that action, was a flawed and ultra vires action from start to finish. A process that was meant to afford simple dispute resolution was transformed into an *ultra vires* civil class action against Rainier Vista, but with none of the protections an actual judicial action affords.

RCW allows landlords to include in their rental agreements the actual utility costs the landlords incur. Part of those "actual costs" are the costs of infrastructure, maintenance, and labor to actually deliver utilities to the tenants on a private system.

The OAH's decision should be reversed, and the notice of violation dismissed.

DATED this 16th day of December, 2015.

Respectfully submitted,



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DECLARATION OF SERVICE

On said day below, I emailed and deposited with the U.S. Postal Service a true and accurate copy of: Opening Brief of Respondent/Cross-Appellant Narrows Real Estate in Court of Appeals Cause No. 47766-1-II to the following parties:

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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: December 17, 2015 at Seattle, Washington.

Matt J. Albers, Paralegal
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